Supreme Court, U. S.
FILED
MAY 29 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1786

GAIL S. HUECKER,
DANIEL R. TIERNEY,
C. LESLIE DAWSON, et al., - - - Petitioners

versus

MARIANNE WEISENBERGER
ELIZABETH MILBURN,
RONALD DELLINGER, et al., - - Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases (Con't):

Constitution, Statutes and Acts:

Miscellaneous:

APPENDIX A

Contents

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioners, Gail S. Huecker, Daniel R. Tierney and C. Leslie Dawson, respectfully pray that a writ of certiorari issue to review the judgment and order of the United States Court of Appeal for the Sixth Circuit entered in this proceeding on February 27, 1979.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, not yet reported, is set out in full in the Appendix, page 41. The judgments and opinions

of the United States District Court for the Western District of Kentucky are set out in full in the Appendix, page 31.

JURISDICTION

The judgment and order of the United States Court of Appeals for the Sixth Circuit on the three cases consolidated on appeal was entered on February 27, 1979. This petition for a writ of certiorari was filed within ninety days of that date. Under the provisions of 28 U.S.C. §1254(1), this Court has jurisdiction to review the judgment below.

QUESTIONS PRESENTED

1. Whether a party is entitled under the provisions of 42 U.S.C. §1988 and the Eleventh Amendment to recover attorney's fees for time and effort spent pursuing attorney's fees.

2. Whether the *Weisenberger* and *Milburn* cases were pending cases at the time the Civil Rights Attorney's Fees Award Act of 1976 became law.

3. Whether awarding attorney's fees to a government funded legal services program is contrary to the provisions of the Legal Services Corporation Act and is an abuse of discretion in that special circumstances exist which render the award unjust.

4. Whether awarding attorney's fees to a government funded legal services program for fifty dollars an hour is reasonable.

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CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Amendment XI:

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42

§1988—

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title, title IX of Public

Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

United States Code, Title 42

§2996—

(1) there is a need to provide equal access to the system of justice in our Nation for individuals who seek redress of grievances;

(2) there is a need to provide high quality legal assistance to those who would be otherwise unable to afford adequate legal counsel and to continue the present vital legal services program;

(3) providing legal assistance to those who face an economic barrier to adequate legal counsel will serve best the ends of justice and assist in improving opportunities for low-income persons consistent with the purposes of this chapter;

(4) for many of our citizens, the availability of legal services has reaffirmed faith in our government of laws;

(5) to preserve its strength, the legal services program must be kept free from the influence of or use by it of political pressures; and

(6) attorneys providing legal assistance must have full freedom to protect the best interest of their clients in keeping with the Code of Professional Responsibility, the Canons of Ethics, and the high standards of the legal profession.

United States Code, Title 42

§2996f(b)—

No funds made available by the Corporation under this subchapter, either by grant or contract, may be used—

(1) to provide legal assistance (except in accordance with guidelines promulgated by the Corporation) with respect to any fee-generating case (which guidelines shall not preclude the provision of legal assistance in cases in which a client seeks only statutory benefits and appropriate private representation is not available);

STATEMENT OF THE CASE

This is a petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit to review a judgment and order of three cases which were consolidated for purposes of appeal. The Court of Appeals affirmed in part the judgments of the United States District Court for the Western District of Kentucky in granting attorney's fees to respondents' counsel. The Court of Appeals reversed the judgments in the *Weisenberger* and *Dellinger* cases and allowed attorney's fees for time spent pursuing attorney's fees.[1]

[1]The plaintiffs filed cross-appeals in *Weisenberger* and *Dellinger* on the issue of attorney's fees for time spent pursuing fees, but did not file a cross-appeal in *Milburn*.

A. *Milburn* v. *Huecker and Tierney; Weisenberger* v. *Huecker and Tierney.*

These cases were originally filed in June of 1972 as class actions by respondents on behalf of themselves and all recipients of benefits under the Aid to Permanently and Totally Disabled program (APTD)[2] and the Aid to Families with Dependent Children program (AFDC),[3] welfare programs jointly administered by the state and federal governments. Plaintiffs claimed that the state (the petitioners) had violated their due process rights by failing to process applications and award benefits within the time limits prescribed by federal regulations.[4] Respondents sought declaratory relief, an order enjoining the petitioners from not acting within the appropriate time periods, an award of all benefits wrongfully withheld since 1968, and reasonable costs and attorney's fees. The District Court found the state's practices violative of federal law and granted prospective relief. The District Court denied, however, the demands for retroactive payment of welfare benefits wrongfully withheld, holding they were barred by the Eleventh Amendment. The District Court also refused requests for costs and attorney's fees. The respondents have been continuously represented by The Legal Aid Society of Louisville, Inc., and have received legal representation without charge of fees.

[2]Title XVI of the Social Security Act; 42 U.S.C. §1351, *et seq.* The AABD program was substantially modified by the Supplemental Security Income (SSI) program, effective January 1, 1974.

[3]Title IV-A of the Social Security Act; 42 U.S.C. §601, *et seq.*

[4]45 C.F.R. §206.10(a)(3)(i) and (ii).

Respondents appealed the cases to the Court of Appeals. *Milburn and Weisenberger, et al.* v. *Huecker, et al.*, 500 F. 2d 1279 (6th Cir. 1974). The Court of Appeals affirmed the District Court's denial of retroactive payment of welfare benefits on the basis of *Edelman* v. *Jordan*, 415 U. S. 651 (1974); and reversed the failure to award costs and attorney's fees and remanded the cases for further finding of facts to permit meaningful appellate review.

On remand, respondents' counsel submitted affidavits summarily estimating ninety (90) hours of work in District Court and forty-five (45) hours in the Court of Appeals in the cases.[5] The District Court awarded attorney's fees to respondents' counsel in the amount of $2,500 in *Milburn* and $2,000 in *Weisenberger*. The Court ordered that petitioners Huecker and Tierney were personally liable for the awards in their individual capacities.[6]

The petitioners appealed the cases to the Court of Appeals.[7] The respondents cross-appealed on the issue of failure of the District Court to award the fees

[5]*Weisenberger:* District Court—40 hours; Court of Appeals—15 hours. *Milburn:* District Court—50 hours; Court of Appeals—30 hours.

[6]These awards were made against petitioners in their individual capacities since the prevailing view of the Sixth Circuit was that the Eleventh Amendment barred the award of attorney's fees against an unconsenting state or against state officials acting in their official capacities. See *Jordan* v. *Gilligan*, 500 F. 2d 701, 705 (6th Cir. 1974), *cert. denied*, 420 U. S. 991 (1975); *Taylor* v. *Perini*, 503 F. 2d 899, 901 (6th Cir. 1974), *vacated on other grounds*, 421 U. S. 982 (1975).

[7]The Sixth Circuit ruled it lacked jurisdiction to review *Milburn* because no separate order was entered by the District Court pursuant to Rule 58, FEDERAL RULES OF CIVIL PROCEDURE. 538 F. 2d 1241, 1243 (6th Cir. 1976).

against the petitioners in their official capacities. The Court of Appeals held that the intervening decision of the Supreme Court in *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U. S. 240 (1975), must be applied and the private attorney general theory relied upon by the District Court in making the award was an inappropriate basis upon which to award attorney's fees. *Huecker, et al.* v. *Weisenberger and Milburn,* 538 F. 2d 1241 (6th Cir. 1976).[8] The Court of Appeals upheld the denial of attorney's fees against petitioners in their official capacities. The case was remanded to the District Court to make specific findings of fact on the issue of whether petitioners exhibited bad faith, and were thereby liable in their individual capacities.

The respondents did not petition for writ of certiorari and the mandate issued on August 11, 1976. Seven months after the second decision by the Court of Appeals, respondents' counsel filed motions for attorney's fees in *Weisenberger* and *Milburn* under the provisions of 42 U.S.C. §1988. The District Court in *Weisenberger* held an evidentiary hearing but denied petitioners attempts at discovery or cross-examination to question the reasonableness of the award.[9] The District Court in *Milburn* conducted no evidentiary hearing. No evidence of bad faith was offered by the respondents in either case. The District Court in both

[8]The case was decided on July 21, 1976. The Civil Rights Attorney's Fee Award Act of 1976 became effective October 19, 1976.

[9]The petitioners attempted to obtain copies of documents of the respondents which related to salaries, budgets and time records of the respondents. Respondents filed a motion for a protective order. Petitioners also attempted to cross-examine respondents' counsel about salary. The District Court sustained respondents' objection and allowed very general testimony on salary by avowal.

cases reaffirmed the previous awards on the basis of 42 U.S.C. §1988, and denied fees for time spent by respondents' counsel pursuing fees.

The petitioners appealed the cases a third time to the Court of Appeals, arguing, among other things, that it was improper for the District Court to rely on the Act; an award to a Legal Services Corporation funded organization was improper; the rate of $50.00 per hour was improper for a Legal Services Corporation funded organization; and, on respondents' cross-appeal in *Weisenberger,* fees for time spent pursuing fees were correctly denied. The Court of Appeals affirmed the award of $2,000 and $2,500 awarded by the District Court. An additional judgment for $2,548 was awarded to plaintiffs' counsel in *Weisenberger* for time spent by respondents' counsel in pursuing fees.[10] *Weisenberger, Milburn and Dellinger* v. *Huecker, Tierney and Dawson,* Nos. 78-3008, 78-3009, 78-3012, 78-3013 and 78-3018 (6th Cir. decided Feb. 27, 1979).

B. *Dellinger* v. *Dawson.*

In May, 1975, respondents filed a complaint on behalf of a statewide class alleging petitioners denied them constitutional and statutory rights by failing to process unemployment insurance benefit claims within specific time limits. On January 17, 1977, the District Court entered judgment requiring that payment of initial unemployment insurance benefits be made within

[10]The Court of Appeals awarded $5,096 divided equally between the *Weisenberger* and *Dellinger* cases for all time spent on the appeals. Appendix, page 49.

twenty-four days of application on all claims uncontested by the former employer. The District Court further ordered that checks to replace lost or stolen checks be delivered to respondents within fourteen days of receipt of an affidavit stating that a benefit check is lost, stolen, or missing.

Respondents subsequently moved the District Court to alter and amend its previous order to allow attorney's fees. The District Court conducted an evidentiary hearing but denied petitioners attempts at discovery or cross-examination to question the reasonableness of the award.[11] On September 13, 1977, the District Court awarded $2,912.50 in attorney's fees to plaintiffs. The District Court refused to allow fees for time spent litigating the attorney's fees issue.

The petitioners appealed the award of attorney's fees arguing in part that an award to a Legal Services Corporation funded organization was improper; the rate of $50.00 per hour was improper; and, on respondents' cross-appeal, the denial of fees for time spent pursuing fees was proper. The Court of Appeals affirmed the award of $2,912.50 and awarded respondents' counsel an additional $2,548.00.[12] *Weisenberger, Milburn and Dellinger* v. *Huecker, Tierney and Dawson, supra.*

[11]See footnote 9, at p. 8, *supra.*

[12]See footnote 10, at p. 9, *supra.*

REASONS FOR GRANTING THE WRIT

1. The Decision of the Court of Appeals in Awarding Attorney's Fees for Time Spent Obtaining Fees Conflicts With the Decisions of Other Courts of Appeals and Involves an Important Constitutional and Statutory Question Which Has Not Been, But Should Be, Settled by the Supreme Court.

The federal courts are in disagreement as to whether an award should include compensation for time spent in pursuit of fees. This confusion is expressed in the three cases in this petition. The District Court denied compensation for pursuit of fees, citing *Lindy Bros. Builders, Inc. of Phila.* v. *American Radiator and Standard Sanitary Corp.,* 540 F. 2d 102 (3rd Cir. 1976), and the Court of Appeals reversed, citing no particular authority but noting the Supreme Court permitted fees on appeal before the Court of Appeals in *Hutto* v. *Finney,* —— U. S. ——, 98 S. Ct. 2565 (1978). The Sixth Circuit failed to note that the fee award on appeal in *Hutto* involved an important substantive issue on which the petitioner lost. In *Weisenberger* and *Milburn,* the only substantive issue ever appealed was done so on respondents' initial appeal and resulted in respondents' loss.[13] There never has been a substantive issue on appeal in Dellinger.

The holdings in other circuits are in conflict. The First Circuit and the Court of Appeals for the District of Columbia apparently agree with the Sixth Circuit ruling in the present cases, and allow awards of attorney's fees for the time spent in pursuit of those fees. *Souza* v. *Southworth,* 564 F. 2d 609 (1st Cir. 1977);

[13]500 F. 2d 1279 (6th Cir. 1974).

and *Parker* v. *Matthews,* 411 F. Supp 1059 (D.D.C. 1976). The Tenth Circuit allows "fees for fees" but limits the award to a smaller rate than is allowed for time spent on substantive issues. *Keyes* v. *School District Number 1, Denver, Colorado,* 439 F. Supp. 393 (D. Col. 1977).

In the Fourth Circuit, the award of attorney's fees for the time spent in pursuit of those fees is not allowed. *Clanton* v. *Allied Chemical Corporation,* 416 F. Supp. 39 (E.D. Va. 1976). In the Second and Ninth Circuits, where "fees for fees" were originally allowed, the courts now hold that such fees are not appropriate. *City of Detroit* v. *Grinnell Corporation,* 560 F. 2d 1093 (2nd Cir. 1977); *Gagne* v. *Maher,* 455 F. Supp. 1344 (D. Conn. 1978); *Boe* v. *Colello,* 447 F. Supp. 607 (S.D.N.Y. 1978); and *In re Equity Funding Corporation of American Securities Litigation,* 438 F. Supp. 1303 (C.D. Cal. 1977). Interestingly, the early cases in the Second and Ninth Circuits were heavily cited by courts in the other circuits in deciding to allow fees for time spent pursuing attorney's fees. The case in the Second Circuit was *Torres* v. *Sachs,* 69 F.R.D. 343 (S.D.N.Y. 1975). This case was affirmed at 538 F. 2d 10 (2nd Cir. 1976), without discussion of the "fees for fees" aspect. It should be noted that the fees for pursuing fees only involved 2.9 hours of work in that case.

The Ninth Circuit case was *Stanford Daily* v. *Zurcher,* 64 F.R.D. 680 (N.D. Cal. 1974), *aff'd.,* 550 F. 2d 464 (9th Cir. 1977), *rev'd.,* — U. S. —, 98 S. Ct. 1970 (1978). The original award of fees in this case was apparently based on unreasonable search and seizure,

and the Supreme Court, in reversing the Court of Appeal's judgment upon which the award was predicated, specifically declined, in footnote 3, to consider the propriety of the award at that time. 98 S. Ct. at 1975. As was pointed out, both of these circuits have now joined the Fourth Circuit in refusing to award attorney's fees for time spent in pursuing fees.

In the Third and Fifth Circuits, a rule on whether to award fees for time spent pursuing fees does not appear to be firmly established. The Third Circuit originally declined to award such fees in *Lindy Bros. Builders, Inc. of Phila.* v. *American Radiator and Standard Sanitary Corporation, supra.* They later distinguished *Lindy* as applying only to awards made under the common benefit theory, and awarded fees for time spent in pursuit of fees under the statutory authority of 42 U.S.C. §2000e. *Prandini* v. *National Tea Co.,* 585 F. 2d 47 (3rd Cir. 1978). Since that decision, a District Court in the Third Circuit has declined to award fees for time spent in pursuit of fees under 42 U.S.C. § 1988, and that judgment has thus far been allowed to stand. *Keown* v. *Storti,* 456 F. Supp. 227 (E.D. Pa. 1978). The Fifth Circuit also has conflicting cases. *Panior* v. *Iberville Parish School Board,* 543 F. 2d 1117 (5th Cir. 1976); and *Latham* v. *Chandler,* 406 F. Supp. 754 (N.D. Miss. 1976).

In general, those courts that have declined to award attorney's fees for time spent in pursuit of fees have done so on the theory that the benefit from such work inured to counsel as distinguished from benefitting the plaintiff or plaintiff class. This distinction is especially

important when plaintiff's counsel is a government funded legal services organization established for the benefit of indigents. On the other hand, those courts that have awarded such fees have generally applied the theory that not to do so would allow a deep-pocket losing party to dissipate the award by appealing the decision.

If the losing party made bad faith objections to a fee claim or in appealing a fee claim, he would be liable for the time spent by the prevailing party under the bad faith theory of recovery. *City of Detroit* v. *Grinnell Corporation, supra.* The cost of the appeal itself would normally stop a losing party from appealing unless he thought he had a good chance of success.

To allow fees for time pursuing fees seriously jeopardizes a defendant's capacity to interpose good faith objections to the claim for fees or appealing the award. If defendants contest what they legitimately consider to be an unreasonable or fraudulent claim for attorney's fess, contesting the fee claim could easily be more costly than the original claim. And where does it end? If defendants do contest the claim and prevail, shouldn't they likewise be awarded fees for time spent successfully contesting fees?

The Supreme Court, in *Hutto* v. *Finney,* 98 S. Ct. at 2573, held that Congress, in amending § 1988, successfully exercised its power to set aside the states' Eleventh Amendment immunity in order to enforce the Fourteenth Amendment. However, Congress did not express any exercise of power, either by the terms of the amendments to § 1988 or its legislative history, to set aside the states' Eleventh Amendment immunity to

award fees for time spent in pursuit of fees. *Fitzpatrick* v. *Bitzer,* 427 U. S. 445 (1976); *Edelman* v. *Jordan,* 415 U. S. 651 (1974); *Employees* v. *Missouri Public Health Dept.,* 411 U. S. 279 (1973). 42 U.S.C. § 1988 provides for award of attorney's fees to enforce the provisions of 42 U.S.C. §§ 1981, 1982, 1983, 1985 and 1986, title IX of Public Law 92-318, title VI of the Civil Rights Act of 1964; or in any civil action by the United States to enforce a provision of the Internal Revenue Code. There is no provision in § 1988 for an award of attorney's fees for obtaining fees under § 1988.

As noted by the Supreme Court in *Alyeska Pipeline Service Co.* v. *Wilderness Society, supra,* federal courts do not have the power to grant fees to prevailing parties without specific statutory authority to do so. Likewise, federal courts do not have the power to grant fees for time spent obtaining fees as there is no statutory authority to do so.

2. The Decision of the Court Below in Awarding Attorney's Fees Pursuant to §1988 in the *Weisenberger* and *Milburn* Cases Is in Conflict With the Decisions of Other Courts of Appeals as They Were Not Pending Cases.

In enacting the 1976 amendments to 42 U.S.C. § 1988, Congress noted its objective:

> In many cases arising under our civil rights laws, the citizens who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, . . . then citizens must have the opportunity to recover what it costs them to vindicate

> these rights in court. SENATE REPORT No. 94-1011, page 2, *reprinted* in [1976] U. S. CODE CONG. & AD. NEWS. 6338, at 6339-6340.

The provisions of § 1988 state that it applies to "pending cases." However, no where does Congress explain in the provisions of the amendment or the legislative history what it means by the term pending case.

The *Weisenberger* and *Milburn* cases were originally filed in 1972 and all substantive, civil rights issues were resolved in the District Court and the Court of Appeals on the first appeal. 500 F. 2d 1279 (6th Cir. 1974). The respondents asserted their civil rights without the provisions of the 1976 amendments to § 1988. Therefore, lack of provision of attorney's fees in no way hindered their vindication.

If the *Weisenberger* and *Milburn* cases were decided in the Court of Appeals for the Fourth Circuit or Fifth Circuit, the results have been different. The Fourth and Fifth Circuit Courts of Appeals would have held the cases were not pending at the time the 1976 amendments of § 1988 became law.

The United States Court of Appeals for the Fourth Circuit correctly applied the "pending case" rule in the school desegregation case of *Wheeler* v. *Durham City Board of Education,* 585 F. 2d 618 (4th Cir. 1978). The initial complaints to force desegregation were filed in 1960. As with so many desegregation cases, numerous orders were entered from time to time by the District Court and appeals taken to the Court of Appeals. In 1972, plaintffs filed a motion for further relief. The District Court denied the relief but the

Court of Appeals reversed and granted plaintiffs the substantive relief they sought. Plaintiffs then moved for attorney's fees on the basis of 20 U.S.C. § 1617 and 42 U.S.C. § 1988 for all work accomplished since 1960. 20 U.S.C. § 1617 permits attorney's fees in school desegregation cases and became effective on July 1, 1972.[14]

The Court of Appeals noted at the outset that both § 1617 and § 1988 have practically identical language; and although the Court ruled with respect to § 1617, it said that, its holding ". . . applied equally to § 1988, for there is no indication that Congress intended the language of the two statutes to be interpreted differently." *Wheeler* v. *Durham City Board of Education,* 585 F. 2d at 621. The Court of Appeals stated the question before it was whether the litigation was pending on the effective date of the statute within the rationale of *Bradley* v. *School Board of City of Richmond,* 416 U. S. 696 (1974). Noting that final orders were entered which decided the rights of the parties, and that appeals on the substantive issues were not taken, the Court of Appeals held that no issue was pending in the sense that the term was used in *Bradley, supra.*

As with § 1988, the Court of Appeals noted that the legislative history of § 1617 is silent as to the definition of pending cases.

> Absent an expression of contrary congressional intent, we think that the statute should be accommodated to the nature of the litigation to which it applies.

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[14] §717 of the Emergency School Aid Act of 1972.

> We therefore hold that § 1617 does not authorize attorneys' fees with regard to those phases of litigation that had been reduced to a final judgment at the time § 1617 became effective. *Wheeler* v. *Durham City Board of Education,* 585 F. 2d at 623.

The Court of Appeals for the Fifth Circuit reached the same conclusion in a § 1983 action filed by plaintiffs in July 1974 against county officials in Texas alleging intolerable living conditions in jail. After two years of litigation, the parties entered a consent decree on July 29, 1976. Based upon existing law at the time, on August 30, 1976, the District Court denied plaintiffs' request for attorney's fees and entered a memorandum opinion and order. A judgment or order was not set out on a separate document as required by Rule 58 of the Federal Rules of Civil Procedure.[15] Plaintiffs moved for reconsideration of attorney's fees pursuant to the 1976 amendments to § 1988. The District Court held that the August 30th order was not a final appealable judgment since a Rule 58 judgment had not been entered and awarded attorney's fees pursuant to § 1988.

The Court of Appeals for the Fifth Circuit reversed. *Escamilla* v. *Santos,* 591 F. 2d 1086 (5th Cir. 1979). Citing *Bankers Trust* v. *Mallis,* 435 U. S. 381 (1978), the Court of Appeals stated that the memorandum opinion will be considered a final judgment. The Court of Appeals held the District Court erred in concluding it had retained jurisdiction to award attorney's fees because at the time the amendments to § 1988 became law, no issues were pending.

[15]This is identical to the situation in the *Milburn* case. See 538 F. 2d at 1243.

The Court of Appeals for the Fifth Circuit considered attorney's fees in relation to 20 U.S.C. § 1617 in *Henry* v. *Clarksdale Municipal Separate School District,* 579 F. 2d 916 (5th Cir. 1978). The school desegregation case was originally filed in District Court in 1964. The case was before the Fifth Circuit four times on substantive desegregation issues.[16] On the fourth appeal, the Fifth Circuit remanded the case to determine, in essence, if the defendants had acted in bad faith in the years preceding the effective date of § 1617 and to determine reasonable fees since July 1, 1972, the effective date of § 1617. *Henry* v. *Clarksdale Municipal Separate School District,* 480 F. 2d at 585-86. The District Court assessed fees for post-July 1, 1972 legal services; and found the defendants had not exhibited bad faith and, therefore, denied pre-July 1, 1972 fees. The plaintiffs appealed, claiming the case was pending on the issue of attorney's fees in the District Court at the time § 1617 became law and, therefore, fees should be awarded for the entire litigation, citing *Bradley, supra.*

The Fifth Circuit affirmed the District Court's ruling. *Henry* v. *Clarksdale Municipal Separate School District,* 579 F. 2d 916 (1978). As in the *Weisenberger* and *Milburn* cases, there were no substantive issues pending in the District Court or on appeal when the statute authorizing an award of attorney's fees was enacted. The Court of Appeals found the District

[16]*Henry* v. *Clarksdale Municipal Separate School District,* 409 F. 2d 682 (5th Cir. 1969), *cert. denied,* 396 U. S. 940 (1969); 425 F. 2d 698 (1970); 433 F. 2d 387 (1970); 480 F. 2d 583 (1973).

Court correctly made a finding of whether the defendants had acted unreasonably and stubbornly in the litigation to determine whether the plaintiffs were entitled to attorney's fees for pre-statutory authorization work. The Fifth Circuit noted the clear distinction:

> At the time [§ 1617] was enacted, all definitive or substantive orders of this Court and the District Court for desegregating the . . . pubic schools . . . had been entered and were being complied with. There were no pending appeals of any sort.
>
> * * * * * * *
>
> To apply [§1617] retroactively, a case must have an 'active' issue pending on the date of its enactment, see *Rainey* v. *Jackson State College,* 551 F. 2d 672, 676 (5th Cir. 1977). *Henry* v. *Clarksdale Municipal Separate School District,* 579 F. 2d at 918 and 919 (5th Cir. 1978).

If the reasoning of the Fourth and Fifth Circuits had been applied in *Weisenberger* and *Milburn,* the Sixth Circuit would have reversed the District Court and denied the $2,000 and $2,500 awards as these amounts were for work accomplished on those phases of the litigation which had been reduced to a final judgment prior to the effective date of § 1988. Indeed, the petitioners were in compliance with the final judgment four years before § 1988 became law.

In *Northcross* v. *Board of Education of Memphis City Schools,* 412 U. S. 427 (1973), the Supreme Court decided the issue of whether a successful plaintiff should ordinarily recover an attorney's fee under 20 U.S.C. § 1617. The Court then decided a question left

open in *Northcross* in *Bradley* v. *School Board of City of Richmond,* 416 U. S. at 710, as to whether § 1617 applies to cases pending on appeal when the law became effective.

In *Hutto* v. *Finney,* 98 S. Ct. at 2573, the Supreme Court decided whether a successful plaintiff can recover an attorney's fee against the state under the bad faith theory of recovery and the 1976 amendments to 42 U.S.C. § 1988. However, both *Hutto* and *Bradley* leave undecided by the Supreme Court the issue of whether § 1988 authorizes an award of attorney's fees in cases in which all § 1983 issues were resolved and appeals exhausted prior to the effective date of the law.

In *Hutto* v. *Finney, supra,* the Supreme Court considered two awards of attorney's fees against state officials: (1) a District Court award against the state as a result of the official's bad faith in failing to cure constitutional violations identified by the District Court; and (2) a Court of Appeals award against the state pursuant to the Civil Rights Attorney's Fees Awards Act of 1976 for plaintiffs' counsel's services on appeal. The District Court award was made prior to enactment of the Act; the Court of Appeal's award was subsequent thereto. The Supreme Court upheld both awards: the District Court award under the bad faith theory and the Court of Appeals award under the provisions of § 1988.

The second decision by the Court of Appeals in *Weisenberger* and *Milburn* is consistent with the decision by the Supreme Court in *Hutto* v. *Finney, supra.* In *Hutto,* the District Court found the defendants had

acted in bad faith and the award served the same purpose as a remedial fine imposed for civil contempt, and vindicated the court's authority over a recalcitrant litigant. 98 S. Ct. at 2574. The Supreme Court ruled the Eleventh Amendment did not prevent an award of attorney's fees against the state agency's officers in their official capacities on a finding of bad faith prior to enactment of § 1988. For an award of attorney's fees against an officer in his individual capacity, § 1988 does not apply and a finding of bad faith is still necessary. 98 S. Ct. 2579. However, in *Weisenberger* and Milburn, the respondents never presented any evidence of bad faith on the part of the petitioners and the District Court never made any finding of bad faith, despite the mandate of the Court of Appeals. *Huecker, et al.* v. *Weisenberger, et al.*, 538 F. 2d at 1246.

It is fundamental law that a District Court has no power or authority to deviate from a mandate issued by a Court of Appeals, even if the mandate was in error. *Briggs* v. *Pennsylvania R. Co.*, 334 U. S. 304 (1948); *United States* v. *Redmond*, 571 F. 2d 513 (9th Cir. 1978); *City of Cleveland* v. *Federal Power Commission*, 561 F. 2d 334 (D.C. Cir. 1977); *Thornton* v. *Carter*, 109 F. 2d 316 (8th Cir. 1940). A judgment which is wrong, but unreversed by a higher court, is as effective as a judgment which is right. *Thornton* v. *Carter, supra.*

The Court of Appeals for the Sixth Circuit, in *Weisenberger* on the second appeal, did not render a judgment which was incorrect or in error. The respondents did not seek a stay of mandate, a petition for writ of certiorari or to have the mandate recalled and

amended. Rather, the District Court completely ignored the mandate and applied § 1988 by virtue of a motion made by respondents seven months after the decision of the Court of Appeals. Therefore, it is clear that the decision of the Sixth Circuit on the second appeal is the controlling law which the District Court should have applied. The "propriety of the fee award" was not pending resolution on appeal when the statute became law. *Bradley* v. *School Board of City of Richmond, supra.*

3. The Decision of the Court Below in Awarding Attorney's Fees of Fifty Dollars an Hour to a Government Funded Legal Services Organization Raises Significant and Recurring Problems in the Lower Federal Courts.

In the *Milburn* case, the District Court did not hold an evidentiary hearing on the award of attorney's fees under the Act contrary to federal court decisions. *Lindy Bros. Builders, Inc. of Phila.* v. *American Radiator & Standard Sanitary Corp.*, 487 F. 2d 161, 169 (3rd Cir. 1973). The Supreme Court in *Perkins* v. *Standard Oil Co.*, 399 U. S. 222 (1970), a case involving award of attorney's fees under section 4 of the Clayton Act, stated that "[t]he amount of the award for such services should, as a general rule, be fixed in the first instance by the District Court, after hearing evidence as to extent and nature of the services rendered." 399 U. S. at 223. Without an evidentiary hearing, it is impossible for the appropriate standards to be reviewed in determining, for purposes of appeal, whether the

award was reasonable. *Milburn* and *Weisenberger* v. *Huecker, et al.*, 500 F. 2d 1279, 1282 (6th Cir. 1974).

The legislative history of the 1976 amendments to 42 U.S.C. §1988 clearly state the standards to be applied in determining the amounts of fees to be awarded.

> The appropriate standards, see *Johnson* v. *Georgia Highway Express*, 488 F. 2d 714 (5th Cir. 1974), are correctly applied in such cases as *Stanford Daily* v. *Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974); *Davis* v. *County of Los Angeles*, 8 E.P.D. 483 ¶9444 (C.D. Cal. 1974); and *Swann* v. *Charlotte-Mecklenburg Board of Education*, 66 F.R.D. 483 (W.D.N.C. 1975). These cases have resulted in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys. In computing the fee prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, 'for all time reasonably expended on a matter.' *Davis, supra; Stanford, supra,* at 648. SENATE REPORT No. 94-1011 at p. 6.

The respondents' counsel have offered no business records which reflect the amount of time which was spent on the cases or the actual cost of the cases. In *Weisenberger* and *Milburn*, the District Court did not require the respondents' counsel reconstruct their efforts on each procedural aspect of the cases or on each of the issues (whether they prevailed on the issues or not) in their claims for $2,000 and $2,500 respectfully.[17] The failure of the District Court to require respondents' counsel to reconstruct the time records in a substantial or reasonably accurate manner is contrary to

[17]See footnote 9, at p. 8, *supra*.

decisions in *In re Borgenicht*, 470 F. 2d 283, 284 (2nd Cir. 1972); *Lindy Bros. Builders, Inc. of Phila.* v. *American Radiator and Standard Sanitary Corp.*, 487 F. 2d 161, 166 (3rd Cir. 1973); *King* v. *Greenblatt*, 560 F. 2d 1024 (1st Cir. 1977), *cert. denied*, —— U. S. ——, 98 S. Ct. 3146 (July 3, 1978). In the *Dellinger* and *Weisenberger* cases, the District Court denied the petitioners' counsel access to business records of the respondents' counsel in an attempt to verify the accuracy of their statement and discover the reasonableness of the award. The District Court indirectly placed the burden of disapproving the award on the petitioners yet failed to allow the petitioners discovery or adequate cross-examination of respondents' counsel.

The petitioners have argued in District Court and the Court of Appeals that respondents' counsel, which is funded by the Legal Services Corporation, is prohibited from accepting fee-generating cases and thus must be prohibited from accepting fees for cases. 42 U.S.C. §2996g(b)(1). This statute provides as follows:

> (b) No funds made available by the Corporation under this subchapter, either by grant or contract, may be used—
>
> (1) to provide legal assistance (except in accordance with guidelines promulgated by the Corporation) with respect to any fee-generating case (which guidelines shall not preclude the provision of legal assistance in cases in which a client seeks only statutory benefits and appropriate private representation is not available);

The Corporation adopted rules which define a fee-generating case as one which "reasonably may be ex-

pected to result in a fee for legal services for an award to a client, from public funds, or from the opposing party." 45 C.F.R. §1609.2; 41 FEDERAL REGISTER 38505 (Sept. 10, 1976). Further, the Corporation in regulation and consistent with the law, stated that the legal services agency (recipient) cannot use Corporation funds to provide legal representation in a fee-generating case unless other representation is unavailable. 45 C.F.R. §1609.3. The regulations further provide that the legal services agency can only seek and accept a fee if the agency has determined under specific guidelines (set out in 45 C.F.R. §1609.4) that other adequate representation is deemed unavailable. 45 C.F.R. §1609.5.

The respondents' counsel failed to establish in the District Court that they had satisfied the requirements of their governing regulations. It is the contention of petitioners that as a Legal Services Corporation recipient, respondents' counsel must submit some evidence that under their regulations they have complied with the requirements that permit them to seek and accept a fee award. Absent such proof, respondents' counsel should be denied any fee.

The District Court and the Court of Appeals found that a reasonable rate of hourly compensation to the respondents' counsel is fifty dollars ($50.00) per hour. The petitioners tried to obtain business documents and testimony on cross-examination which would clearly show that fifty dollars an hour was not and is not necessary to "attract competent counsel" and will "produce windfalls to [legal services program] attorneys."

SENATE REPORT No. 94-1011, page 6. The District Court and the Court of Appeals rejected the petitioners argument. The petitioners strongly feel the federal courts need specific guidance in this area of the law.

It must be noted that the purpose of the Legal Services Corporation Act and funding of free legal services is to "provide equal access to the system of justice . . . for individuals who seek redress of grievance;" and "to provide high quality legal assistance to those who would be otherwise unable to afford adequate legal counsel. . . ." 42 U.S.C. §2996(1) and (2). Therefore, the Legal Services Corporation Act is designed to give legal services for the indigent, and fees which are adequate to attract counsel should not be the controlling test in determining the rate of reimbursement when individuals are represented by legal services attorneys. Rather, the controlling test in determining the amount of the fees to be awarded to government funded legal services is whether such an award will result in a windfall. The standard which should be applied in determining a reasonable rate of reimbursement should be different for a case in which a legal services attorney is representing an individual than if an attorney in private practice is representing an individual. By allowing evidence and consideration of the actual costs involved in the representation, the government funded legal services program will be adequately compensated and windfalls will not result.

In civil rights actions pursuant to 42 U.S.C. §1983, defendants are government officials. As is noted in the legislative history to 42 U.S.C. §1988, "In such cases it

is intended that the attorney's fees . . . will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party)." SENATE REPORT No. 94-1011, p. 5. The deep pocket which state funds naturally offer become an incentive or temptation to counsel to inflate their hours and rate of compensation to claim more as reimbursement than could be recovered from private parties. *Copeland* v. *Marshall*, No. 77-1351, Court of Appeals for the District of Columbia Circuit; 18 E.P.D. 8827 (October 20, 1978); 47 U.S.L.W. 2305. Indeed, state funds will tempt attorneys to seek out civil rights issues to litigate if the rate of compensation is more than the actual cost of litigation.

CONCLUSION

For these reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

Ann T. Hunsaker

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General Counsel

Counsel for Petitioners

PROOF OF SERVICE

I, Ann T. Hunsaker, Counsel for the Petitioner here certify that three (3) copies of the foregoing Petition were mailed, postage prepaid, to Honorable Lawrence S. Elswit, Counsel for Respondent, Legal Aid Society of Louisville, Inc., 425 West Muhammad Ali Blvd., Louisville, Kentucky 40202, on this the 25th day of May, 1979.

Ann T. Hunsaker

ANN T. HUNSAKER
Assistant General Counsel

APPENDIX

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 7299-A

MARIANNE WEISENBERGER, ET AL. - - - - *Plaintiffs*

v.

GAIL S. HUECKER, ET AL. - - - - - - *Defendants*

JUDGMENT—Entered September 26, 1977

On motion of the plaintiffs, and the Court being sufficiently advised,

IT IS ORDERED AND ADJUDGED that the Legal Aid Society of Louisville, Inc. recover the sum of $2,000 as attorneys' fees against the defendants, Gail S. Huecker and Daniel R. Tierney, jointly and severally. Said judgment shall be paid within 30 days of the date of this judgment and shall bear interest at the rate of 6 per cent per annum from the date of this judgment until paid.

This is a final and appealable judgment and there is no just cause for delay.

September 23, 1977

(s) Charles M. Allen
United States District Judge

cc: Counsel of Record

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 7299-A

MARIANNE WEISENBERGER, ET AL. - - - *Plaintiffs*

v.

GAIL S. HUECKER, ET AL. - - - - - *Defendants*

MEMORANDUM OPINION—Entered September 26, 1977

This action is submitted to the Court, pursuant to an order entered by the Court on August 15, 1977. At issue is whether or not the Legal Aid Society should receive any additional fees as a result of 28½ hours expended by Attorneys Henry B. Hinton, Jr. and Kurt Berggren in attempting to secure attorneys' fees for the Legal Aid Society in this Court and in the United States Court of Appeals for the Sixth Circuit.

The Court has determined, in a case very similar to this, to wit: *Dellinger, et al.* v. *Dawson, et al.*, No. C 75-0156L(A) filed September 13, 1977, that Legal Aid Society attorneys are not entitled to recover attorneys' fees for work expended in connection with their motion for the award of fees. The reasoning, as set out in that case, is that an award of legal fees would only redound to the benefit of the Legal Aid Society and not to the benefit of their clients, since their clients are on a non-paying basis. We realize that in *Lindy Brothers Builders, Inc. of Philadelphia* v. *American Radiator and Standard Sanitary Corp.*, 487 F. 2d 161 (3rd Cir. 1973); see, also 540 F. 2d 102 (1976), claims for attorneys' fees representing time spent in persuading

the Court as to the amount of fee which should be awarded, are not compensable by the Court. That case, of course, involved a somewhat different situation, since any attorneys' fees which were awarded diminished the recovery accruing to the named plaintiffs and the class which they represent. Such would not be the case here.

In conclusion, we have entered an order this day denying the motion of the Legal Aid Society for additional fees by awarding to them fees in the amount of $2,000. We predicate this judgment on the fact that the fee was awarded prior to the appeal in *Huecker* v. *Milburn*, 538 F. 2d 1241 (6th Cir. 1976), wherein the court, in footnote 3, p. 1243, referred to this Court's finding that the Legal Aid Society spent an estimated 40 hours in the District Court and 15 hours in the Appellate Court.

This Court sees no reason to rehash the questions raised at this time and, therefore, reaffirms its award of $2,000.

September 23, 1977

(s) Charles M. Allen
United States District Judge

cc: Counsel of Record

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. 7301-B

ELIZABETH MILBURN, ET AL. - - - - - - *Plaintiffs*

v.

GAIL S. HUECKER, ET AL. - - - - - - *Defendants*

JUDGMENT—Entered November 17, 1977

On motion of the Legal Aid Society for payment of fees by the defendants, Huecker and Tierney, and the Court being sufficiently advised,

It is ORDERED AND ADJUDGED that the defendants, Gail S. Hueckner and Daniel R. Tierney, jointly and severally, pay the sum of Two Thousand Five Hundred ($2,500.00) Dollars as attorneys' fees to the Legal Aid Society of Louisville.

This is a final and appealable Judgment, and there is no just cause for delay.

This 16th day of November, 1977.

(s) Thomas A. Ballantine, Jr.
United States District Judge

Copies to:
Counsel of record

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. 7301-B

ELIZABETH MILBURN, ET AL. - - - - - - *Plaintiffs*

v.

GAIL S. HUECKER, ET AL. - - - - - - *Defendants*

MEMORANDUM OPINION—Entered November 17, 1977

This matter is pending on the motion of the Legal Aid Society for the allowance of fees for representing the indigent plaintiffs.

In *Huecker* v. *Milburn,* 538 F. 2d 1241 (6th Cir., 1976), the Court of Appeals stated that it lacked jurisdiction to pass on the question of attorneys' fees since no final Order had been entered directing payment.

The Court is not now disposed to discuss in any further detail the Memorandum entered by Judge Bratcher on February 19, 1975. This Memorandum will be adopted by reference in its entirety, and the Court further finds that the passage of the Civil Rights Attorneys' Fees Award Act of 1976, P.L. 94-559, lends further support to the award of fees in cases such as this.

The Court further finds that the defendants, Huecker and Tierney, jointly and severally, are liable to the Legal Aid Society in the sum of Two Thousand Five Hundred ($2,500.00) Dollars, and an appropriate Judgment has been entered this date.

This 16th day of November, 1977.

(s) Thomas A. Ballantine, Jr.
United States District Judge

Copies to:
Counsel of record

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. C 75-0156 L(A)

RONALD DELLINGER, ET AL. - - - - - - *Plaintiffs*

v.

LESLIE DAWSON - - - - - - - - - - *Defendants*

JUDGMENT—Entered September 13, 1977

The Court, having entered its findings of fact and conclusions of law, and being fully advised in the premises,

IT IS ORDERED AND ADJUDGED that the State defendants, Leslie Dawson, Gail S. Huecker, Michael Morriaty, Daniel Tierney, and Gene Vandergriff, their servants, agents, successors and all other persons in privity with them pay the sum of $2,912.50.

IT IS FURTHER ORDERED AND ADJUDGED that said sum be paid to the Legal Aid Society as attorneys' fees awarded to it by the Court.

This is a final and appealable judgment and there is no just cause for delay.

Dated: 9-13-77

(s) Charles M. Allen
United States District Judge

cc: Counsel of Record

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. C 75-0156 L(A)

RONALD DELLINGER, et al. - - - - - *Plaintiffs*

v.

LESLIE DAWSON, et al. - - - - - *Defendants*

FINDINGS OF FACT AND CONCLUSION OF LAW—Entered September 13, 1977

This action is submitted to the Court on the motion of the plaintiffs for attorneys' fees in the amount of $3,737.50. The Court held an evidentiary hearing in accordance with the holding in *Lindy Brothers Builders, Inc. of Philadelphia* v. *American Radiator and Standard Sanitary Corp.*, 487 F. 2d 161 (3rd Cir. 1973); see, also, 540 F. 2d 102 (1976).

The Legal Aid Society, in this action, represented a class of plaintiffs who requested the Court to enter judgment requiring the State defendants to process promptly unemployment benefit applications which are uncontested, and further to deliver promptly replacement checks where such benefit checks were lost, stolen or missing, and further requesting certain relief as to the Secretary of Labor. While plaintiffs did not succeed in all of their requests, they did obtain a summary judgment ordering the State defendants to process all unemployment benefit applications for extended, second extended or supplemental unemployment benefits which are uncontested in such a manner that payment be mailed personally to the applicant within 24 days

after the application for benefits had been filed. Plaintiffs also succeeded in obtaining from the Court the summary judgment a requirement that the State defendants deliver any replacement checks within 14 days. Also, the judgment requires the State defendants to make reports to this Court until December 15, 1977 regarding their carrying out the provisions of the judgment. The complaint as to the Secretary of Labor was dismissed.

Counsel for plaintiffs thereby secured a judgment which was of benefit to a large class of persons, the exact number of which is unknown. Also, it should be noted that their request for attorneys' fees will not diminish any rights which the class-plaintiffs have secured as a result of the judgment, contrary to the situation in *Lindy, supra,* where the attorneys' fees were payable out of the fund recovered by them on behalf of their clients.

The plaintiffs' affidavits and testimony at the hearing reveal that the attorneys for the Legal Aid Society expended 58.5 nontrial hours, which they claim is compensable at $50 per hour, and 7.5 trial hours, which they claim is compensable at $65 per hour. However, the Court notes that three attorneys were present at the so-called trial, which was actually a motion for a restraining order, and the Court finds that it is not necessary that more than one attorney be present at the hearing on the motion, therefore, resulting in a disallowance of two-thirds of the amount requested in connection with trial hours.

We observe also that Professor Lloyd Anderson, formerly an attorney for the Legal Aid Society, filed his affidavit as to the amount of time consumed by him in connection with the instant case. The Court finds that the time spent by Mr. Anderson, with one exception, is included in the time referred to in Mr. Elswit's affidavit and is, therefore duplicative. The one exception pertains to an item which consumed 5 hours.

Also, the Court finds that the Legal Aid attorneys expended 12.5 hours in connection with their motion for attorneys' fee. *Lindy, supra,* holds that the time expended in obtaining attorneys' fees should not be allowed as a basis for the award of attorneys' fees in a case where a fund has been made available for distribution to the prevailing plaintiffs, and where the attorneys' fees would come out of that fund and diminish the amounts recoverable by the members of the prevailing class. *Lindy, supra,* therefore, is not completely controlling on this Court, and the Court believes that it would be unwise to convert *Lindy's* holding into an absolute holding that in no case could a successful plaintiff's attorney recover fees for time spent in connection with the application for fees. The Court can envision a situation where a successful plaintiff would have a contract with his attorney for a fee based upon an hourly rate, subject to a credit for any fees recovered from the defendant. In that event, the denial of attorneys' fees for the work expended in connection with the motion for fees would result in a diminution of the successful plaintiff's net recovery, whereas an award of the fees would tend to make him whole.

However, this is not the case here, inasmuch as there is no showing that the class-plaintiffs are bound by any agreement to pay fees to the Legal Aid Society. No doubt such an agreement might well be contrary to the rationale for the existence of the Legal Aid Society. We, therefore, have deleted from the fee computation of the plantiffs the 12-½ hours spent in connection with the fee application.

Finally, we must deduct a reasonable amount for the time spent in connection with the preparation of pleadings as to the Secretary of Labor and briefs in connection therewith. While the Legal Aid attorneys candidly stated that they could not place a percentage figure on the time consumed in these areas, the Court notes that almost the entire

focus of the action has been directed at the State defendants and not at the Secretary of Labor. We, accordingly, deduct only 5 percent of the net amount remaining after deductions for the application for attorneys' fees and for duplicative work.

We note that the attorneys for the Legal Aid Society are highly-skilled in the field of welfare law such as is involved in the instant case. We recognize their request for fees, insofar as the hourly rate is concerned, to be eminently reasonable. We note in passing, that private counsel employed by the Commonwealth of Kentucky in an action pertaining to the constitutionality of the Kentucky Bail-bond statute, have stated that reasonable fees for their senior partners are $100 per hour, for junior partners $75 per hour and for associates $60 per hour. We, therefore, have no hesitation in awarding Legal Aid Society attorneys compensation based upon the hourly rates which they suggest.

The Court has this day entered a judgment in accordance with these findings of fact and conclusions of law.

(s) Charles M. Allen
United States District Judge

Dated 9/13/77
cc: Counsel of Record

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Nos. 78-3008, 78-3009, 78-3012, 78-3013 and 78-3018

MARIANNE WEISENBERGER, ELIZABETH MILBURN, RONALD DELLINGER, et al. - - *Plaintiffs-Appellees, Cross-Appellants,*

v.

GAIL S. HUECKER, DANIEL TIERNEY, C. LESTER DAWSON (now PETER CONN), Secretary of the Kentucky Department for Human Resources, et al. - - - - *Defendants-Appellants, Cross-Appellees*

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY

OPINION—Decided and Filed February 27, 1979.

Before: EDWARDS, Chief Circuit Judge, WEICK and CELEBREZZE, Circuit Judges.

CELEBREZZE, Circuit Judge.

Defendants, administrators of the Kentucky welfare and unemployment insurance programs, appeal from an award of attorney's fees in three cases arising from the United States District Court for the Western District of Kentucky. Plaintiffs have cross-appealed in two of the cases from the district court's denial of attorney's fees for legal services performed in pursuit of fees. These appeals present three basic issues: whether the district court properly relied

upon the Civil Rights Attorney's Fees awards Act of 1976[1] [hereinafter Act] as a basis for awarding attorney's fees; whether the district court properly exercised its discretion in computing and awarding the fees; and whether attorney's fees may be awarded for legal services performed in pursuit of attorney's fees. For the reasons stated below, we affirm in part, reverse in part, and remand with directions.

I

A. *Milburn* v. *Huecker*
Weisenberger v. *Huecker*

This is the third opportunity this court has had to review these appeals. These cases were originally brought as class actions by plaintiffs on behalf of themselves and all recipients of benefits under the Aid to Permanently and Totally Disabled program (APTD) and the Aid to Families with Dependent Children program (AFDC), welfare programs jointly administered by the state and federal governments. Plaintiffs claimed that the state had violated their due process rights by failing to process applications and award benefits within the prescribed time limits. Plaintiffs sought declaratory relief, an order enjoining the defendants from not acting within the appropriate time periods, an award of all benefits wrongfully withheld, and reasonable costs and attorney's fees. The district court found the state's practices violative of federal law and granted prospective relief. The court denied, however, the demands for

[1]Pub. L. 94-559 (Oct. 19, 1976), *codified* in 42 U.S.C. § 1988:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

retroactive payment of welfare benefits wrongfully withheld, holding they were barred by the eleventh amendment. The district court also refused requests for costs and attorney's fees.

On the first appeal presented to this court, 500 F. 2d 1279 (6th Cir. 1974), we affirmed the district court's grant of prospective relief and affirmed, on the basis of *Edelman* v. *Jordan*, 415 U. S. 651 (1974),[2] the denial of retroactive relief. We reversed the failure to award costs and attorney's fees and remanded the cases for further finding of facts to permit meaningful appellate review.

On remand the district court in each case abandoned its previous position and awarded attorney's fees to plaintiffs. The district court awarded attorney's fees in the amount of $2,500 in *Milburn* and $2,000 in *Weisenberger*. Both awards were to be paid by the defendants in their individual capacities.[3]

On our second review of these cases we only reviewed the attorney's fee award in *Weisenberger*.[4] We held the

[2]In *Edelman* v. *Jordon*, 415 U. S. 651 (1974), the Supreme Court held that the eleventh amendment deprived federal courts of jurisdiction to award past due welfare benefits payable from a state's treasury, and that a state's participation in a federal welfare program does not, without more, constitute an implied waiver of eleventh amendment immunity.

[3]These awards were made against defendants in their individual capacities since the then prevailing view in our circuit was that the eleventh amendment barred the award of attorney's fees against an unconsenting state or against state officials acting in their official capacities. *See Jordon* v. *Gilligan*, 500 F. 2d 701, 705 (6th Cir. 1974), *cert. denied*, 420 U. S. 991 (1975); *Taylor* v. *Perini*, 503 F. 2d 899, 901 (6th Cir. 1974), *vacated on other grounds*, 421 U. S. 982 (1975). Other circuits espoused the contrary position. *See Heucker* v. *Milburn*, 538 F. 2d 1241, 1244 n.5 (6th Cir. 1976) (collecting cases). This conflict has been resolved in civil rights cases against the prior position of this circuit. *See* note 7, *infra*.

[4]We lacked jurisdiction to review the *Milburn* award because no separate order was entered by the district court pursuant to FED. R. CIV. P. 58. 538 F. 2d 1241, 1243 (6th Cir. 1976).

eleventh amendment did not constitute a bar to an award of attorney's fees against state officials individually since such awards would not be paid out of the state's treasury. We were required, however, to remand the case a second time. An intervening decision of the Supreme Court, *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U. S. 240 (1975), held that the private attorney general theory relied upon by the district court in making the award was an inappropriate basis upon which to award attorney's fees. We instructed the district court to make specific findings of fact on the issue of whether defendants exhibited "bad faith." Under *Alyeska* only a finding of "bad faith" could justify a fee award in the present cases.

In the interim between our second remand of these cases and the district court award of fees presently under review, the Supreme Court decided the case of *Fitzpatrick* v. *Bitzer,* 427 U. S. 445 (1976). The Court held in *Fitzpatrick* that the eleventh amendment and the principle of state sovereignty it embodies are limited by the enforcement provisions of § 5 of the fourteenth amendment. Section 5 grants Congress authority to enforce "by appropriate legislation" the substantive provisions of the fourteenth amendment.[5] The Court stated in Fitzpatrick:

> When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority. We think that Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts.

Id. at 456 (footnote omitted).

[5]The Court held in *Fitzpatrick* that the eleventh amendment does not bar an award of backpay benefits in a Title VII suit against a state employer in light of the fact that the 1972 Amendments to Title VII, 42 U.S.C. §§ 2000-e, *et seq.*, which made Title VII applicable to state employers, were enacted pursuant to Congress' § 5 power to enforce the fourteenth amendment.

On October 19, 1976, also between our second remand and the district court awards presently before us, Congress enacted, pursuant to its § 5 power, the Civil Rights Attorney's Fees Awards Act of 1976.[6] The Act provides that in certain civil rights suits a court may in its discretion award attorney's fees to prevailing parties as part of the costs of the litigation. The Supreme Court in the recent case of *Hutto* v. *Finney,* ____ U. S. ____, 98 S. Ct. 2565 (1978), held that the Act is a clear exercise of the § 5 power of Congress to set aside a state's eleventh amendment immunity and "to authorize fee awards payable by the States when their officials are sued in their official capacities." *Id.* at ____, 98 S. Ct. at 2575.[7]

[6]See note 1, *supra.*

[7]The Court in *Hutto* discussed another rationale in support of the power of Congress to authorize such an award against state officials acting in their official capacities. The Court stated:

> The Act imposes attorney's fees "as a part of the costs." Costs have traditionally been awarded without regard for the State's Eleventh Amendment immunity. The practice of awarding costs against the States goes back to 1849 in this Court. *See Missouri* v. *Iowa,* 7 How. 660, 681, 12 L. Ed. 861, 870; *North Dakota* v. *Minnesota,* 263 U. S. 583, 44 S. Ct. 208, 68 L. Ed. 461 (Collecting cases). The Court has never viewed the Eleventh Amendment as barring such awards, even in suits between States and individual litigants.

Hutto v. *Finney,* ____ U. S. at ____, 98 S. Ct. at 2576 (footnote omitted but commended to the reader).

The prior decisions of this court in the present cases and in others which held the eleventh amendment constituted a bar to an award of attorney's fees against state officials acting in their official capacities, *see* note 3, *supra,* are no longer good law in suits within the purview of the Act.

On the second remand, the district court in each case specifically relied upon the Act to support the awards of attorney's fees. The district court made no findings on the issue of "bad faith." Defendants assert on this third appeal that it was improper for the district court to rely on the Act. Plaintiffs in *Weisenberger* but not *Milburn* have cross-appealed from the district court's denial of attorney's fees for time spent pursuing attorney's fees.

B. *Dellinger* v. *Dawson*

This case is before this court for the first time. In May, 1975, plaintiffs filed a complaint on behalf of a statewide class alleging defendants denied them constitutional and statutory rights by failing to process unemployment insurance benefit claims within specific statutory time limits. On January 17, 1977, the district court entered judgment requiring that payment of unemployment insurance benefits be made within twenty-four days of application on all claims uncontested by the former employer. The court further ordered that replacement checks be delivered to claimants within fourteen days of receipt of an affidavit stating that a claimant's due and owing benefit check is lost, stolen, or missing.

Plaintiffs subsequently moved the district court to alter and amend its previous order to allow reasonable attorney's fees. On September 13, 1977, the district court awarded $2,912.50 in attorney's fees to plaintiffs. The district court refused to allow fees for time spent litigating the attorney's fee issue. Defendants have appealed from only the part of the final judgment which awarded attorney's fees.[8] Plaintiffs have cross-appealed from that portion of the final judgment which denied an award of attorney's fees for time spent pursuing attorney's fees.

[8]Defendants did not appeal from the district court judgment with respect to the merits of the case.

II

"A court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley* v. *Richmond School Board,* 416 U. S. 696, 711 (1974); *Thorpe* v. *Housing Authority of the City of Durham,* 393 U. S. 268 (1969); *United States* v. *Schooner Peggy,* 1 U. S. (1 Cranch) 358 (1801); *Republic Steel Corp.* v. *Costle,* 581 F. 2d 1228, 1233 (6th Cir. 1978). Since the Act was in existence at the time the district court made the fee awards, it is applicable to the instant cases.[9] The Supreme Court in *Hutto* v. *Finney,* ____ U. S. ____, 98 S. Ct. 2565, specifically held that the Act is applicable to cases that were pending when the statute was enacted. *Id.* at . . . . n. 23, 98 S. Ct. at 2576 n. 23. *See also Monroe* v. *County Board of Education,* 583 F. 2d 263 (6th Cir. 1978). The legislative history of the Act evidences a clear Congressional intent that the Act be applied to pending cases. See S. Rep. No. 94-1011, 94th Cong., 2d Sess., *reprinted* in [1976] U. S. Code Cong. & Ad. News 5908; H. R. Rep. No. 94-1558, 94th Cong., 2d Sess., 4 n. 6. Further, defendants have made no showing to this court that "manifest injustice" would result upon application of the Act to the present cases. Accordingly, the district court properly determined that the Act was applicable since the plaintiffs were prevailing parties and the cases were pending when the Act became law.[10]

Our review of the records in these cases also leads us to conclude that the amount of the awards in each case was

[9]All three of the present cases were originally brought under 42 U.S.C. § 1983. The Act by its terms applies to § 1983 suits.

[10]When the Act became law only the attorney's fee issue remained undecided in *Milburn* and *Weisenberger.* We do not agree with defendant's argument that such cases cannot be regarded as pending cases. *See King* v. *Greenblatt,* 560 F. 2d 1024 (1st Cir. 1977), *cert. denied,* ____ U. S. ____ (1978).

appropriate and a proper exercise of discretion.[11] The district court appropriately determined the amount of time plaintiffs' counsel spent on these cases and utilized a reasonable hourly rate of compensation in arriving at a reasonable award. Defendants have failed to display any evidence that would lead us to conclude the district court abused its discretion in this regard.

III

On cross-appeal in *Weisenberger* and *Dellinger,* plaintiffs allege that the district court abused its discretion in refusing to award attorney's fees for counsel time spent pursuing the recovery of attorney's fees. We agree.

When Congress passed the Act its basic purpose was to encourage the private prosecution of civil rights suits through the transfer of the costs of litigation to those who infringe upon basic civil rights. If a successful party in a civil rights suit is awarded attorney's fees under the Act and he cannot secure attorney's fees for legal services needed to defend the award on appeal, the underlying Congressional purpose for the Act would be frustrated. We conclude that implementation of Congressional policy requires the awarding of attorney's fees for time spent pursuing attorney's fees in the cases presently under review. This award should also include amounts for legal time

[11]The original attorney's fee awards in *Weisenberger* and *Milburn* were made against the defendants in their individual capacities. *See* 538 F. 2d at 1243. The awards were made in that manner because of the then current status of eleventh amendment jurisprudence in our circuit. *See* note 3, *supra.* It is clear that the Act currently permits an award of attorney's fees against state officials in their official capacities. *Hutto* v. *Finney,* ____ U. S. ____, 98 S. Ct. 2565. The awards currently under review were made under the auspices of the Act. Accordingly, we construe the awards to be against defendants in their official capacities. No findings of "bad faith" are needed to support an award of attorney's fees against state officials acting in their official capacities under the Act. *Id.* at ____, 98 S. Ct. at 2579. The same reasoning applies to the award in *Dellinger.*

spent defending and prosecuting the instant appeals. The Supreme Court in *Hutto* v. *Finney,* ____ U. S. ____, 98 S. Ct. 2565, upheld the authority of the court of appeals under the Act to award attorney's fees for legal services rendered in the presentation of an appeal before the court of appeals.

In *Monroe* v. *County Board of Education,* 583 F. 2d 263, 265 (6th Cir. 1978), a case dealing with attorney's fee awards, we stated:

> Under other circumstances the action would be remanded for a determination of such reasonable amount, but we do not choose to follow that course for two reasons. First, the additional delay which would be occasioned by such a remand would further postpone the award of compensation which has already lingered in the courts for an unconscionable time, and this Court's long and detailed familiarity with what has transpired during the history of this protracted litigation make it possible for a determination of reasonable compensation to be made at this judicial level.

We feel this statement is equally applicable here. Based upon all of the factors and circumstances which we deem to be relevant, and the affidavits of plaintiffs' counsel submitted to this court, we conclude that the additional sum of $5,096.00 would provide reasonable compensation for plaintiffs' counsel and properly vindicate Congressional policy underlying the Act.[12]

[12]Counsel for plaintiffs submitted affidavits before the district court and this court relating the number of hours expended before the district court since the original fee awards and in our court prosecuting the present appeals. We have taken the number of hours submitted by plaintiffs' counsel, 113.25 hours, and reduced it by 10% to account for duplication of efforts among the respective attorneys. *See Oliver* v. *Kalamazoo Bd. of Educ.,* 576 F. 2d 714, 715 n. 2 (6th Cir. 1978). In arriving at the total amount awarded we multiplied the reduced number of hours by a rate of $50 per hour, a rate of hourly compensation found to be reasonable by the district court.

Accordingly, the judgment of the district court in *Milburn* and the portions of the judgments in *Weisenberger* and *Dellinger* awarding attorneys' fees, as construed by this court against defendants in their official capacities, are affirmed. The portions of the judgments in *Weisenberger* and *Dellinger* which denied plaintiffs attorney's fees for time spent pursuing attorney's fees are reversed. *Weisenberger* and *Dellinger* are remanded to the district court with directions to enter judgment for an additional $5,096.00, divided equally between each case, as attorney's fees for plaintiffs' counsel to be assessed against the defendants in their official capacities as part of the costs of this case.